SEP 29 PAGE 4

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No. 02-10038

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

ROBERT JAMES TENNARD
Petitioner,

v.

JANIE COCKRELL, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent-Appellee

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner's Reply to Respondent's Brief in Opposition

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 6

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Cases

Atkins v. Virginia, 536 U.S. 304 (2002) 1,2,3,4,6

Johnson v. Texas, 509 U.S. 350 (1993) 4,5

Penry v. Lynaugh, 492 U.S. 302 (1989) 2,3,4,5,6

Secondary Authority

American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (10th Ed. May, 2002) 3-4

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Argument

Respondent Cockrell argues that the Court's October, 2002 remand of Mr. Tennard's case for further consideration in light of *Atkins v. Virginia*, 536 U.S. 304 (2002), was merely to be sure Tennard did not present an *Atkins* claim. As she states in her Brief in Opposition, "because Tennard's prior petition raised the possibility of mental retardation, including a sub-70 IQ score, remand was a prudent disposition to protect against the possibility of a substantive *Atkins* violation." *Id.* at 14-15.

Such an argument trivializes the remand decision in Mr. Tennard's case. A remand decision is not lightly made and is, in undersigned counsel's experience, never exercised to "protect" against mere "possibilities."

Moreover, the Court did not need to remand to the Fifth Circuit for such "protection," because counsel for Mr. Tennard was very explicit in informing the Court in the July, 2002 petition for writ of certiorari that Tennard was not presenting, and had not presented, an *Atkins* claim. Counsel argued expressly in that petition that Tennard raised only a *Penry*[1] claim. She did not try to stretch that claim into an *Atkins* claim. Indeed, she urged the Court to examine the *Penry* claim and not take any comfort in the possibility that the result of Mr. Tennard's unconstitutional penalty trial would be taken care of in the future by a yet-to-be-presented *Atkins* claim:

> The decision in *Atkins v. Virginia* should not be seen as somehow mooting out the need to address the *Penry I* violation in this certiorari proceeding. *Whether or not* Mr. Tennard is able to satisfy a yet-to-be-defined evidentiary standard for establishing mental retardation in future proceedings brought under *Atkins*, his present death sentence violates the Eight Amendment under *Penry v. Lynaugh*. Mr. Tennard's evidence of subnormal intellectual functioning presented at his sentencing trial was indisputably mitigating, yet his sentencer was precluded from considering it or giving it mitigating effect under the pre-*Penry* special issues. The prosecutor argued that the jury could not take this evidence into account without violating the law, and defense counsel tried to suggest a way for the jury to take it into account despite the law. These circumstances establish a *Penry I* violation as surely as they did in Mr. Penry's original trial.

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[1] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

Petition for Writ of Certiorari, *Tennard v. Cockrell*, No. 02-5164, filed July 3, 2002, at 17-18. In short, the basis for the Court's remand in light of *Atkins* could not have been to assure itself that there was no *Atkins* claim. The remand, therefore, must have been concerned with the new light cast upon *Penry* claims by *Atkins*.

That light goes directly to the Fifth Circuit's disposition of Mr. Tennard's *Penry* claim. As we have argued in the present petition for writ of certiorari, the light cast by *Atkins* is the recognition that any *Penry* claim based on evidence that is consistent with the defendant having mental retardation – whether or not the trial jury would have found, if directly asked, that the defendant actually has mental retardation – is a meritorious claim under the pre-*Penry* Texas sentencing procedure. *Atkins* makes clear that such evidence, whether it conclusively establishes mental retardation or not, constitutes mitigating evidence as a matter of law, and a capital sentencer must be allowed to give it mitigating effect under the instructions.

Mr. Tennard's counsel presented evidence consistent with mental retardation. He presented evidence that the Texas prison classification process determined, when Mr. Tennard was seventeen years old, that he had an IQ of 67. He also presented evidence that Mr. Tennard functioned in the world like a person who had an IQ of 67. Specifically, he showed that Tennard's judgments were naive and reflected gullibility and simplicity. An IQ of 67, measured before the age of eighteen, concurrent with impairments in adaptive behavior such as naivete and gullibility, are consistent with mental retardation. *See* American Association on Mental Retardation, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (10th Ed. May, 2002), at 1, 82 (noting the settled elements of mental retardation – "significant limitations both in intellectual functioning and in adaptive behavior ... originat[ing] before the

age of 18" – and further noting that gullibility and naivete reflect limitations in adaptive behavior).

When Mr. Tennard's trial counsel presented this evidence, neither *Atkins* nor *Penry* had been decided. Thus, there was no reason to frame for the jury the question of whether Mr. Tennard actually had mental retardation. In failing to conclude that this evidence, in conjunction with the pre-*Penry* "special issue" sentencing instructions and the arguments of counsel in Tennard's case, established a *Penry* violation, however, the Texas Court of Criminal Appeals and the Fifth Circuit got sidetracked by whether this evidence conclusively established that Mr. Tennard had mental retardation. That question was not relevant to whether there was a *Penry* violation. The relevant questions were (1) whether this evidence was mitigating, and (2) whether the jury had any means of giving this evidence mitigating effect through the special issues.

The remand in Mr. Tennard's case answers the first question. The evidence presented at Tennard's sentencing proceeding, which was consistent with mental retardation, was constitutionally mitigating. *Atkins* established at least this much with respect to evidence that is consistent with mental retardation. It constitutes mitigating evidence as a matter of law. That is why this Court remanded for reconsideration of Tennard's *Penry* claim in light of *Atkins*.

Second, this evidence could not be given any mitigating effect under the special issues provided to Tennard's jury. As the Court explained in *Johnson v. Texas*, 509 U.S. 350, 369 (1993), the determinative question under *Penry* is whether "the jury had a meaningful basis to consider the relevant mitigating [evidence]...." In *Johnson*, the mitigating evidence was youth. The Court determined that the aspects of youth that both supported future-dangerousness and were also mitigating – impulsivity and recklessness – nevertheless could be given mitigating

effect under the Texas scheme:

> The evidence of petitioner's youth ... falls outside *Penry*'s ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue.

Id.

By contrast, "the jury had [no] meaningful basis to consider," *Johnson v. Texas*, 509 U.S. at 369, the mitigating aspects of the evidence of Mr. Tennard's significant limitations in intellectual functioning and its attendant manifestations in his naive – and deficient – judgments. The defense could only urge the jury, in "tak[ing] all things into consideration" in answering the special issues, SF 29:94, that it answer one of the issues, "no." This plea was based solely on an appeal to the jury's sympathy for a person like Mr. Tennard, not an any logical relationship the evidence bore to the special issues. Indeed, there was no way for the jury to give Mr. Tennard's intellectual impairment and lesser capacity to make socially appropriate judgments mitigating effect in answering the two special issues, because this evidence bore no logical mitigating relationship to the issues. The prosecutor thereafter made this point and confirmed the *Penry* violation when he argued that the only relationship this evidence bore to the special issues was as aggravating evidence – *i.e.*, the evidence established only "why he became a danger...." SF 29:98. Unlike the evidence of youth in *Johnson*, there was no indication that the limitations in Tennard's intellectual functioning and adaptive behavior were subject to change. These limitations were just as permanent as the diagnosed mental retardation in *Penry*. There was no way for the jury to mitigating effect to this evidence under the pre-*Penry* special issues.

From this perspective, it does not matter whether the Texas Court of Criminal Appeals determined in state habeas proceedings that the evidence of mental retardation at Mr. Tennard's trial was insufficient to establish mental retardation. This determination was a red herring that blinded both the Court of Criminal Appeals and the Fifth Circuit to the *Penry* violation in front of them. It precluded them from analyzing whether the evidence at trial – which at the very least established significant intellectual impairment and adaptive behavior deficits prior to the age of eighteen that was similar to mental retardation – could have been given any mitigating effect.

Conclusion

In short, the remand to the Fifth Circuit in 2002 in light of *Atkins* was a message to the Fifth Circuit to treat evidence of intellectual deficiency that is consistent with mental retardation in the same way evidence of mental retardation is treated for purposes of *Penry* claims. For this reason, the Court should grant the present petition for writ of certiorari and vacate Mr. Tennard's death sentence for violating the Eighth Amendment rule of *Penry v. Lynaugh*.

Respectfully submitted,

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Certificate of Service

I hereby certify that I served a copy of the Petitioner's Reply to Respondent's Brief in Opposition in the above-styled case, on counsel of record for Respondent by depositing this document with the United States Postal Service, first class postage prepaid, addressed to Assistant Attorney General Charles Palmer, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, whose telephone number is (512) 936-1600, this 9th day of September, 2003.

All parties required to be served have been served.

Mandy Welch
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